IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1873 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO No

2. To be referred to the Reporter or not? Yes :

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO No

5. Whether it is to be circulated to the Civil Judge? No :

DINESHKUMAR MANILAL PARMAR

Versus

STATE OF GUJARAT

Appearance:

Mr.N.K.Pahwa for M/S THAKKAR ASSOC. for Petitioners

Ms.M. L. SHAH, A.G.P. for Respondent No. 1

MR DD VYAS for Respondent No. 2

MR BG JANI for Respondent No. 4

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 01/11/1999

J U D G E M E N T

1. The prayer of the seven petitioners in this writ petition is to quash the order dated 2.4.1994, Annexure : A, communicated on 13.4.1999 and the order dated 10.1.1997 at Annexure : C.

2. Brief facts essential for disposal of this petition are as under :

Sub Plot Nos. 7, 8, 21 and 26 situate on the Highway, opposite Lakhtar Petrol Pump, Lakhtar, District Surendranagar are owned by the respondent No.4. On 20.4.1974 the respondent No.2 granted N.A. permission for the said land to the owner - respondent No.4 to be used for residential use only. Thereafter lay out plan was approved by the respondent No.2 on 6.11.1974. Lay out plan and the N.A. permission were not in the knowledge of petitioners. Petitioners took portion of the aforesaid land on rent from respondent No.4 between the years 1982 to 1985. Rent Notes were executed and the petitioners were paying rent regularly to the respondent No.4 and there was no default in payment of rent from the side of the petitioners. Petitioners put up small Dhaba for earning their livelihood. There is no pakka construction and only temporary structure was raised by the petitioners for running Dhaba on the Highway. They occupied the land without objection till 6.1.1994. Petitioners received notices from the respondent No.2 alleging certain breaches of N.A. permission order and requiring the petitioners to show cause as to why the order for the alleged breach be not passed. Petitioners submitted detailed reply to the respondent No.2 wherein it was inter-alia stated that the liability to pay Rs.19,327.27 ps. towards land revenue and deposit of Rs.1000/- was on the land owner and he was to meet this financial liability. As regards non-residential use of the land it was submitted before the Authority that in view of specific Government Resolution providing for regularisation of such use as contained in Annexure : I to the additional affidavit the respondent No.2 was bound to accept the request for regularisation. However, without giving any reasons he passed impugned order, Annexure : A. Thereafter the petitioners filed Civil Suit before the Civil Judge (J.D.), Surendranagar and challenged the said order. They were not informed that they could avail of remedy under Sec.211 of the Bombay Land Revenue Code. Ex-parte injunction was granted by the Civil Court against dispossession of the petitioners and upon hearing the parties Civil Court vacated the injunction order on the ground of alternative remedy. Thereafter petitioners filed Revision under Sec. 211 of the Bombay Land Revenue Code in August, 1996. This revision was dismissed by order dated 10.1.1997, Annexure : C to the writ petition. Thereafter respondent No.3 issued notice to respondent No.4 on 7.1.1997 to comply with the orders and pay the land revenue and also to remove the petitioners from the land. Respondent No.3 by order dated 19.2.1997 directed the petitioners to vacate

the land failing which appropriate action was to be taken against them for removing their structures vide Annexure:D.

3. Respondent No.2 in his Counter Affidavit has deposed that the petition suffers from suppression of fact hence it is required to be dismissed in limine. It is also pleaded that the petitioners have got alternative remedy hence also the petition is not maintainable. Another stand in this counter Affidavit is that since the petitioners have filed Civil Suit No.30 of 1995 which is pending the writ petition is not maintainable. It is further pleaded that since the petitioners are not the owners of the land hence they have no locustandi to file present petition. On merits it is pleaded in the counter Affidavit that N.A. permission was granted to the land owners for residential use only, but the land owner violated the conditions laid down in the N.A. permission and they had changed the purpose from residential to commercial without taking prior permission. Hence proceedings under the Bombay Land Revenue Code were initiated and proper order was passed after full inquiry.

4. The respondent No.4 in his counter Affidavit has alleged that it is incorrect that any rent note was executed by the petitioners or that they are paying rent regularly to this respondent. It is denied that they are tenants of the respondent No.4. On the other hand it is stated that the petitioners are trespassers over the land of respondent No.4 since five years and for committing trespass criminal cases have been filed against them which are pending in competent Court. Since the petitioners, according to this respondent, are trespassers and running hotel and canteen without legal licence the trespassers are not entitled to any protection from this court. It is also alleged that on account of suppression of material facts, especially filing and pendency of civil Suit No.30/95 the petition is liable to be dismissed. It is also stated that the petitioners are not occupants of the land in question hence they have no locus-standi to file this petition.

5. Certain facts are not in dispute. On 20.4.1974 the respondent No.2 granted N.A. permission to the respondent No.4. This permission was to use the agricultural land for N.A. purpose, namely, for residential purpose only. It was subsequently found that the conditions granting N.A. permission were violated and instead of using the land for residential purpose it was used for commercial purpose, namely, for running hotel and canteen, of course not by the actual owners,

but by the petitioners. Three breaches were found to be established in one of the impugned orders dated 2.4.1994, Annexure : A. The first was that condition No.2 was violated inasmuch as a sum of Rs.19,327.27 ps. was not paid as land revenue by the owners/occupants. The second breach was that the land was used for commercial purpose and not for residential purpose and the third breach was that a sum of Rs.1000/- should be deposited by the owners because no measurement was carried out. It is also admitted that after this order the owner/occupier did not comply with the directions contained in order dated 2.4.1994 nor did he apply for regularisation of breaches committed by him. Feeling aggrieved from this order revision was preferred by the petitioners which was dismissed. It is also admitted that the petitioners themselves have not made any application to the District Development Officer or the Taluka Development Officer for regularisation of breaches committed by the owner/occupier nor they intimated in writing that they are ready to pay the outstanding dues against owner/occupier nor they have deposited any amount for regularisation of such breaches.

6. Learned Counsel for the petitioner, however, argued that under Sec.65 of the Bombay Land Revenue Code even tenants can move application for grant of N.A. permission and likewise tenants can apply for regularisation of breach of conditions committed by the land owner/occupier.

7. Section 65 simply provides that if any occupant wishes to use his holding or any part thereof for any other purpose the Collector's permission shall in the first place be applied for by the occupant. The occupant has been defined in Section 3(16) of the Bombay Land Revenue Code to mean a holder in actual possession of unalienated land other than the tenant provided that the holder in actual possession is tenant the landlord or superior landlord, as the case may be, shall be deemed to be occupant. Thus, reading of Section 65 and Section 3(16) of the Bombay Land Revenue Code will clearly indicate that the application for N.A. permission is to be moved by the occupant. The occupant is not to be interpreted as any person including trespasser who is in actual possession. On the other hand occupant means a person who is using his holding or part thereof. Thus, occupant will be the person who is using his holding. If the tenant or trespasser occupied such holding it cannot be said that he is using his holding rather it will be deemed that he is using holding of the actual owner/occupier. In view of Section 3(16) of the Bombay

Land Revenue Code in the first place occupant means holder in actual possession other than tenant. It is therefore clear in the first instance that a person other than a tenant holding the land in actual possession will be called as occupant. In the second place where the holder is tenant and he is in actual possession in that event the landlord or superior landlord shall be deemed to be the occupant. Thus, tenant under Section 3(16) of the Bombay Land Revenue Code cannot be said to be occupant. If this is so then a trespasser also cannot be said to be the occupant within the meaning of Section 3(16) of the Code simply because he is in actual occupation.

8. Learned Counsel for the petitioners, however, placed reliance upon a Division Bench Prounouncement of this Court in Gopalbhai Karamshibhai Patel v/s. C.M.Joshi, reported in 1976 G.L.R. 108. This case, to my mind, is distinguishable on facts. In this case it was undisputed rather admitted that N.A. permission was obtained by the owner and the land was then let out to the tenants and the tenants occupied the same for about 25 years. Rent was not only regularly paid by the petitioners in that case, but it was enhanced from time to time. N.A. permission was initially obtained by the owner for five years which was subsequently extended from time to time. The last exstention was till 31.7.1963. Thereafter the owner/occupant refused to make any application for extention of N.A. permission. It was on this admitted fact that the Division Bench of this Court held that where such lawful lease has been created by the occupant for N.A. use and where the relevant statute requires any permission to be obtained by the occupant so that such N.A. use can be made or continued by the concerned tenants, it would be an implied obligation of the occupant to make necessary application for N.A. purpose. The occupant cannot evict these tenants so long as they were ready and willing to pay rent in view of the statutory protection afforded by the Bombay Rent Act. It was further held that the landlord occupant could not by adopting a subterfuge or not making the requisite application for permission for N.A. use seek to deprive the tenants of their lawful protection of the Rent Act by adopting this clever ruse and, in any event, the authorities who are justly administering this law would refuse to be a party to such a clever ruse adopted by the ingenious landlord. The authorities would be making all efforts to see that no such dishonesty succeeds.

9. These observations, according to the learned Counsel for the petitioners apply with full force to the

facts of this case. However, I am unable to agree with this contention for the obvious reason that it is not admitted by the respondent No.4 that the petitioners are his tenants. On the other hand it is alleged that they are trespassers having encroached upon the land since five years and for committing trespass criminal cases have been filed which are pending in Lakhtar Court. It has not been denied by the petitioners that the criminal cases are not pending against them. Thus in the first place factual controversy is raised whether the petitioners are tenant of the respondent No.4 or not. This factual controversy cannot be decided in this writ petition because it requires evidence more particularly when the relationship of landlord and tenant between the petitioners and the respondent No.4 is denied and allegation of trespass has been made by the respondent No.4. Even prima facie there is nothing on record to show that any rent note was executed by the petitioners during relevant period. Two rent notes were subsequently filed as Annexures. Those are not the original rent notes. Para : 3 of the petition says that all the petitioners executed rent notes between 1982 to 1985. As against this the copies of two rent notes filed along with additional affidavit are dated 9.7.1986 and 30.4.1986. These two dates are therefore obviously beyond the period 1982-1985 which is mentioned in Para : 3 of writ petition. As such prima facie these two copies of rent notes appear to be suspicious. Further suspician arise in rent note dated 9.7.1986. It was purported to have been executed on 9.7.1986 whereas the date of purchase of stamp paper on which it was executed is shown as 10.7.1986. If the stamp paper was purchased on 10.7.1986 the document could not be executed on 9.7.1986. Further contents of the document show that the party giving and the party getting the writing was the same, namely, one of the petitioners. Other annexure shows that the other rent note was executed by Jhala Bharatsinh Jivubha on 30.4.1986. Jhala Bharatsinh Jivubha is not the petitioner. Petitioner No.2 on the other hand is Rana Bharatsinh Jivubha. Further in this note also the person giving and getting the writing was the same, namely, Jhala Bharatsinh Jivuba. It is said that the rent was paid regularly and it has been paid up-to-date, but not a single rent receipt has been filed. Thus, in the first place disputed question of fact cannot be decided in this writ petition that the petitioners are the tenants of the respondent No.4. Secondly there is no prima facie documentary evidence on record of this petition that the petitioners are tenants of respondent No.4. The alleged rent notes are highly suspicious. There is no denial that criminal cases for committing

trespass have been filed against the petitioners by respondent No.4. As such it is not a case where it is admitted that the petitioners were tenants right from 1982 up-to-date. On the other hand trespass and illegal possession of the petitioners is alleged by the respondent No.4 for a period not exceeding 4 to 5 years. Consequently pronouncement in Gopalbhai's case (supra) cannot be applied with force to the facts of the present case.

10. Learned Counsel for the petitioners further contended that action of the authoritis below is arbitrary and they could have regularised the breaches on the strength of Government Resolution dated 27.8.1980, Annexure : I to the additional Affidavit dated 23.10.1999. After going through the contents of this resolution it can safely be said that this resolution does not authorise either a tenant or trespasser to get regularised the breaches committed by the land owner occupier. Consequently no benefit of this Government Resolution can be given to the petitioners.

11. Last contention has been that this Court may direct the authorities - respondents No.2 & 3 to consider application of the petitioners for egularisation of breaches and the petitioners are ready to pay all the outstanding dues from the land holder occupier and also premium in the nature of penalty. This was the offer made by the learned Counsel for the petitioner at the end of his argument. However, no such relief has been sought in the petition. Further no application has so far been moved by the petitioners before the Competent Authority or the authorities empowered to regularise such breach of conditions granting N.A. permission. As such it cannot be said that the Authorities have failed in discharging their duties and as such no mandamus can be issued to the authorities, respondents No.2 & 3 to permit the petitioners to move an application before them for regularisation of breaches and consider the same in accordance with law. Those authorities will hardly be competent to decide disputed question of facts, namely, whether the petitioners are tenants of the respondent No.4 or they are trespassers. Unless the factum of tenancy is admitted by the respondent No.4 no direction can be given to the Authorities to decide the matter in the light of the verdict of this court in Gopalbhai's case (supra).

11. I do not find any merit in the objection that the petitioners have concealed filing of Civil Suit and rejection of injunction application. It is disclosed in

Para : 5 of the petition that Civil Suit was filed in the Court of Civil Judge (J.D.), Surendranagar where ex-parte injunction was granted which was subsequently refused after hearing the parties. Thus, there is no suppression of material facts by the petitioners.

12. Objection that the petitioners have no locus-standi now becomes meaningless after the matter has been examined on merits. There is also no force in the objection that alternative remedy is available to the petitioners. They have filed misconceived Civil Suit against order Annexure : A and thereafter they filed revision under Section 211 of the Bombay Landd Revenue Code which was dismissed. Thereafter this writ petition was filed.

13. In view of aforesaid discussion I do not find any force in the preliminary objections raised by the respondents. However, on merits the writ petition fails for the reasons stated above. It is incorrect to say that the order Annexure : C was not passed on merits rather it was passed considering only the fact that alternative remedy is available to the petitioners to approach Civil Court. From what is contend in para : 3 (c) of the order of the revisional authority, contained in Annexure : C, it cannot be said that the revision was dismissed on the ground that alternative remedy is available. On the other hand this observation means that if the applicants are feeling aggrieved against implementation then they can approach competent Civil Court praying for appropriate relief against opponent No.1. The opponent No.1 was the same man who is respondent No.4 in this writ petition. This direction, therefore, means that if the petitioners felt aggrieved from fixation of liability regarding payment of amount fixed in the order, Annexure : A, they can seek relief against respondent No.4 of this writ petition from competent court.

14. For the reasons stated above, I do not find any merit in this writ petition which is hereby dismissed with no order as to costs.

sd/-

Date : November 01, 1999 (D. C. Srivastava, J.)

sas